No. 18541

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

R. W. AGNEW,

Appellant,

vs.

RICHARD W. MOODY, MACK E. RHODES, RICHARD LASKIN, WILLIAM B. BURGE, WILLIAM DORAN, *et al.*,

Appellees.

APPELLEES' REPLY BRIEF.

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Appellees.

APPELLEES' REPLY BRIEF.

Questions Presented.

I.

Whether the amended complaint filed in this action contained a short and plain statement of the claim showing that the pleader is entitled to relief as required by Rule 8(a) of the Federal Rules of Civil Procedure.

II.

Whether the amended complaint was properly dismissed as to Appellees Richard W. Moody and Mack E. Rhodes after the Appellant failed to comply with the Order of the lower Court to amend his amended complaint within twenty days.

III.

Whether the amended complaint as to Appellees Richard Laskin, William B. Burge and William Doran was properly dismissed because they are immune by reason of the quasi judicial privilege.

Summary of Argument.

I.

Appellant failed to file a complaint which contained a short and plain statement of the claim.

II.

Appellant refused to comply with the Order of the District Court that if he wished to file an amended complaint as to Appellees Richard W. Moody and Mack E. Rhodes, that he do so within twenty days.

III.

The Appellees Richard Laskin, William B. Burge and William Doran were Deputy City Attorneys of the City of Los Angeles at all times mentioned in the amended complaint, and as such, they are immune from liability for the activities which are alleged in the amended complaint.

ARGUMENT.

I.

Appellant Failed to File a Complaint Which Contained a Short and Plain Statement of the Claim.

The Appellant has cited many cases and quoted language from these cases in support of his premise that the amended complaint is a short and plain statement of the claim. In many instances the language quoted is an accurate statement of the law and what the cases held. However, in the case at bar, an examination of the fifty-seven page amended complaint is all that is necessary to see that the amended complaint is contrary to Rule 8(a) of the Federal Rules of Civil Procedure.

Mr. Agnew on page 11 of Appellant's Opening Brief demonstrates that he is able to make a short and plain statement of his claim when he summarized for this Honorable Court what the amended complaint in the case at bar alleged.

While it is true that there are nineteen defendants in the case at bar, these defendants all fall into one of four groups. One group of defendants are police officers; another group of defendants are Deputy City Attorneys; still another group are defendants connected with the judicial process which tried Mr. Agnew in the Municipal Court—while the last group of defendants are in the construction business. So it is not as if the Appellant was presented in the case at bar with the task of alleging claims against nineteen diverse defendants.

It is interesting to note that in most of the cases cited by the Appellant in connection with his Argument that the amended complaint is a short and plain statement of a claim, are cases wherein the Court dismissed the complaint with prejudice. In the case at bar the amended complaint was dismissed as to all defendants because it failed to state a short and plain claim, but it was not dismissed with prejudice as to all defendants [Rep. Tr. p. 14, line 17, to p. 15, line 10]. In the case at bar it is clear from the language of the District Court that the amended complaint was dismissed as to the defendants other than Richard W. Moody and Mack E. Rhodes with prejudice on the grounds of immunity [Rep. Tr. p. 14, line 17, to p. 15, line 10]. Therefore, the many cases cited by the Appellant in support of his premise that there was a short and plain statement of a claim are not applicable in most part as to the Appellees Richard W. Moody and Mack E. Rhodes.

The Appellees do not believe it is necessary that the amended complaint be analyzed paragraph by paragraph to indicate the verboseness and unclearness of the amended complaint in order to substantiate the ruling of the Federal District Court in the case at bar that the amended complaint was in violation of Rule 8(a) of the Federal Rules of Civil Procedure.

If this rule is to be given any effect or meaning, the ruling of the Federal District Court must be affirmed by this Honorable Court.

II.

Appellant Refused to Comply With the Order of the Court That if He Wished to File an Amended Complaint as to Appellees Richard W. Moody and Mack E. Rhodes That He Do so Within Twenty Days.

The District Court in the case at bar on November 2, 1962, issued an Order granting the Appellant twenty days leave to amend his complaint as against Richard W. Moody and Mack E. Rhodes [Tr. p. 120]. Mr. Agnew, up to the present time, has never filed an amendment to the amended complaint that is on file in the case at bar. It is apparent from the various notices of appeal that were filed by the Appellant almost immediately after the above Order of the District Court was filed, that he never intended to follow that Order.

In the case at bar the Federal District Court waited until February 11, 1913, before filing its Order dismissing the action which allowed the Appellant over three (3) months within which to file his amendment to the amended complaint [Tr. p. 117].

The case of *Link v. Wabash R. Co.,* 370 U. S. 626, 8 L. Ed. 2d 734, 82 S. Ct. 1386, is the latest case of the United States Supreme Court which discusses the power and authority of a Federal trial court to dismiss an action for failure of a plaintiff to prosecute or to comply with an Order of the Court.

Commencing on page 737 of the Lawyer's Edition of the above case, the Court stated:

> "The authority of a federal trial court to dismiss a plaintiff's action with prejudice because of

his failure to prosecute cannot seriously be doubted. The power to invoke this sanction is necessary in order to prevent undue delays in the disposition of pending cases and to avoid congestion in the calendars of the District Courts. The power is of ancient origin, having its roots in judgments of nonsuit and non prosequitur entered at common law, e.g., 3 Blackstone, Commentaries (1768), 295-296, and dismissals for want of prosecution of bills in equity, e.g., id., at 451. It has been expressly recognized in Federal Rules of Civil Procedure 41 (b), which provides, in pertinent part:

"'(b) Involuntary Dismissal: Effect Thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. . . . Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication upon the merits.'

"Petitioner contends that the language of this Rule, by negative implication, prohibits involuntary dismissals for failure of the plaintiff to prosecute *except* upon motion by the defendant. In the present case there was no such motion.

"We do not read Rule 41 (b) as implying any such restriction. Neither the permissible language of the Rule—which merely authorizes a motion by the defendant—nor its policy requires us to conclude that it was the purpose of the Rule to

abrogate the power of courts, acting on their own initiative, to clear their calendars of cases that have remained dormant because of the inaction or dilatoriness of the parties seeking relief. The authority of a court to dismiss sua sponte for lack of prosecution has generally been considered an 'inherent power,' governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases. That it has long gone unquestioned is apparent not only from the many state court decisions sustaining such dismissals, but even from language in this Court's opinion in *Redfield v. Ystalyfera Iron Co.,* 110 U. S. 174, 176, 28 L. ed. 109, 110, 3 S. Ct. 570. It also has the sanction of wide usage among the District Courts. It would require a much clearer expression of purpose than Rule 41 (b) provides for us to assume that it was intended to abrogate so well-acknowledged a proposition.

"Nor does the absence of notice as to the possibility of dismissal or the failure to hold an adversary hearing necessarily render such a dismissal void. It is true, of course, that 'the fundamental requirement of due process is an opportunity to be heard upon such notice and proceedings as are adequate to safeguard the right for which the constitutional protection is invoked.' *Anderson Nat. Bank v. Luckett,* 321 U.S. 233, 246, 88 L ed 692, 705, 64 S Ct 599, 151 ALR 824. But this does not mean that every order entered without notice and a preliminary adversary hearing of-

fends due process. The adequacy of notice and hearing offends due process. The adequacy of notice and hearing respecting proceedings that may affect a party's rights turns, to a considerable extent, on the knowledge which the circumstances show such party may be taken to have of the consequences of his own conduct. The circumstances here were such as to dispense with the necessity for advance notice and hearing.

"In addition, the availability of a corrective remedy such as is provided by Federal Rules of Civil Procedure 60 (b)—which authorizes the reopening of cases in which final orders have been inadvisedly entered—renders the lack of prior notice of less consequence. Petitioner never sought to avail himself of the escape hatch provided by Rule 60 (b).

"Accordingly, when circumstances make such action appropriate, a District Court may dismiss a complaint for failure to prosecute even without affording notice of its intention to do so or providing an adversary hearing before acting. Whether such an order can stand on appeal depends not on power but on whether it was within the permissible range of the court's discretion."

The most recent case dealing with a similar set of facts as the case at bar is the case of *Maddox v. Shroyer,* 302 F. 2d 903. In that case the Court dismissed the complaint because of the failure of the plaintiff to follow the direction of the District Court to amend his complaint because he failed to file a short and plain statement of the claim. In that case also,

like the case at bar, the plaintiff appeared to flagrantly disregard the Order of the trial Court.

Another case that the Appellees wish to bring to the attention of this Honorable Court is the case of *Thompson v. Johnson,* 253 F. 2d 43. This case affirmed the dismissal of the lower trial Court when the plaintiff failed to amend his complaint after the trial Court so ordered.

These cases above cited by the Appellees are clear and show that the Order of the trial Court of the case at bar dismissing the action as against Richard W. Moody and Mack E. Rhodes was proper. Any further discussion of the facts of the case at bar and the above cited cases would be superfluous.

III.

The Appellees Richard Laskin, William B. Burge and William Doran Were Deputy City Attorneys of the City of Los Angeles at All Times Mentioned in the Amended Complaint and as Such They Are Immune From Liability for the Activities Which Are Alleged in the Amended Complaint.

The Appellee's Reply Brief will not attempt to discuss or differentiate all of the cases that have been cited by the Appellant in the Appellant's Opening Brief which he contends are relevant cases dealing with the question of immunity as to these Appellees.

The case of *Kenney v. Fox,* 232 F. 2d 288, is in the opinion of the Appellees a proper starting point for the discussion of immunity of quasi judicial officers. In the *Kenney* case the Court discusses both the questions of whether the immunity of judicial of-

ficers has been abrogated by the Civil Rights Act and the availability of immunity to quasi judicial officers.

The Appellant seemingly adopts the position that the Civil Rights Act has abrogated the immunity of judicial officers (Appellant's Op. Br. p. 37). Appellant relies on the cases of *Picking v. Penn R. Co.,* 151 F. 2d 240 and *McShane v. Moldovan,* 172 F. 2d 1016, amongst other cases, in support of his contentions. Both of these cases, *Picking v. Penn. R. Co. (supra)* and *McShane v. Moldovan (supra),* were interpreted by the *Kenney v. Fox,* 232 F. 2d 288, case, in light of the later Supreme Court case of *Tenney v. Brandhove,* 341 U. S. 367, 71 S. Ct. 783, 95 L. ed. 1019. After analyzing all three cases, the Court in *Kenney v. Fox* (*supra*), said:

> "We are of firm opinion that the common law rule of immunity of a judicial officer for acts done in the exercise of his judicial function where he has jurisdiction over both parties and the subject matter, has not been abrogated by the Civil Rights Act."

The Court in *Kenney v. Fox,* 232 F. 2d 288, along with deciding that the Civil Rights Act did not abrogate the Doctrine of Judicial Immunity, held at page 290 that:

> "A prosecuting attorney is a quasi judicial officer and enjoys the same immunity from a civil action for damages as that which protects a judge acting within his jurisdiction over the parties and the subject matter of the litigation."

The Doctrine of Judicial Immunity was last discussed by the Supreme Court of the United States in the case of *Barr v. Matteo,* 360 U. S. 564, 79 S. Ct. 1335, ... L. ed. 2d 1434, when the Court at page 1440 of the Lawyer's Edition, held:

> "This court early held that judges of courts of Superior or general authority are absolutely privileged as respects civil suits to recover for actions taken by them in the exercise of their judicial functions, irrespective of the motives with which those acts are alleged to have been performed, Bradley v. Fisher (US) 13 Wall 335, 20 L ed 646, and that a like immunity extends to other officers of government whose duties are related to the judicial process. Yaselli v Goff (CA2 NY) 12 F2d 393, 56 ALR 1239, affd per curiam 275 US 503, 72 L ed 395, 48 S Ct 155, involving a Special Assistant to the Attorney General."

The reasons for the immunity from liability that is extended to quasi judicial officers, and those in like circumstances, has been discussed in many leading cases and the arguments in support of the quasi judicial immunity are repeated throughout the case of *Barr v. Matteo (supra)*, and the Appellees, rather than repeat the language of the Supreme Court, refer this Court to that case.

A later case which involved prosecuting attorneys and is applicable to the case at bar is *Simons v. O'Connor,* 187 Fed. Supp. 702, where the Court at page 704 held:

> "To the extent that plaintiff's claim is predicated upon alleged bad faith or malice, it is in-

> sufficient to support a recovery. In *Morgan v. Sylvester,* 2 Cir., 1955, 220 F. 2d 758, dismissal of a complaint brought under 42 U.S.C.A. §§ 1983, 1985, against state judicial, quasi-judicial, and legislative officers, alleging that they maliciously and corruptly conspired to deprive plaintiff of her constitutional rights was affirmed by the Court of Appeals 'on authority of Gregoire v. Biddle, 2 Cir., 177 F. 2d 579 and Tenney v. Brandhove, 341 U. S. 367, 71 S. Ct. 783, 95 L. ed. 1019.'"

The Appellees are not unmindful of the case of *Marshall v. Sawyer,* 301 F. 2d 639, which was decided by this Honorable Court, and which is cited by the Appellant on page 39 of Appellant's Opening Brief. It is clear from the short space allotted by the Appellant in his Opening Brief to this case that he too, like the Appellees, does not feel that it was a case wherein the question of immunity was raised.

It appears to the Appellees that in the *Marshall v. Sawyer (supra)* the question of immunity was not raised by either side. The important question for decision in that case was the abstention doctrine, and the elements of a Civil Rights Act damage case.

The interpretation of *Marshall v. Sawyer,* 301 F. 2d 639 that is given to it by the Appellees is somewhat the same position that the Court in *Kenney v. Fox (supra)* gave to the case of *McShane v. Moldovan,* 172 F. 2d 1016, where it discusses the *McShane* case on page 293 of the *Kenney v. Fox* case, as follows:

> "The important question for decision in the McShane case was, as stated by the court, 172 F. 2d at page 1019, 'whether the allegations of the com-

plaint disclosed that appellees, in their alleged conduct, acted under "color of law" '. The Picking opinion was cited as bearing on that question, not on the question of judicial immunity. Although a justice of the peace was one of the defendants in the McShane case, the case involved an alleged conspiracy among the justice of the peace, a complaining witness, a constable and others. The defendants were considered as a group of conspirators, with no separate consideration being given to them individually. The question of judicial immunity was not discussed; apparently it was not raised by the defendant justice of the peace. In any event, any implied ruling on the question of judicial immunity in a case not involving a conspiracy must yield to the later ruling of the Supreme Court in Tenney v. Brandhove, supra."

Conclusion.

For the reasons hereinabove advanced it is respectfully submitted that the Order of the Federal District Court dismissing the Appellant's amended complaint should be affirmed.

Respectfully submitted,

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Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

JOHN A. DALY